

**IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

DIXIE RESTAURANTS, INC.
d/b/a DIXIE CAFÉ,

Plaintiff,

v.

**PHILIPS CONSUMER ELECTRONICS
COMPANY, a Division of Philips Electronics
North American Corporation,
BILL SCHROEPPEL d/b/a SOUTHERN
CREATIONS, and LONGWELL COMPANY
a/k/a and d/b/a LONGWELL ELECTRONICS,
INC.,**

Defendants.

Case No. 02-2461 D/A
JURY DEMAND

**THE ST. PAUL PROPERTY AND LIABILITY
INSURANCE COMPANY As Subrogee of
MBB Licensee of THE LEARNING HOUSE,**

Plaintiff,

v.

**PHILIPS CONSUMER ELECTRONICS
COMPANY, a Division of PHILIPS
ELECTRONICS NORTH AMERICA CORP.,
BILL SCHROEPPEL d/b/a SOUTHERN
CREATIONS, LONGWELL COMPANY a/k/a
and d/b/a LONGWELL ELECTRONICS, INC.,**

Defendants.

Case No. 03-2506 D/A
JURY DEMAND

ORDER DENYING DEFENDANT LONGWELL ELECTRONICS, INC.'S MOTION TO
DISMISS AMENDED COMPLAINT OF PLAINTIFF ST. PAUL PROPERTY AND
LIABILITY INSURANCE COMPANY.

This matter is before the Court on the motion of Defendant Longwell Electronics, Inc.

(“Defendant”) to dismiss the amended complaint of Plaintiff, St. Paul Property and Liability Insurance Company, as Subrogee of MBB Licensee of The Learning House (“Plaintiff”) pursuant to Rules 12(b)(5) and 12(b)(4) of the Federal Rules of Civil Procedure. For the following reasons, the Court DENIES Defendant’s motion to dismiss.

I. Factual Background¹

The following facts are presumed to be true for purposes of the instant motion only. On or about January 8, 2001, a fire started in the building next door to Plaintiff The Learning House (“Learning House”) in the business of Defendant Southern Creations (“Southern Creations”). At some time prior to the fire, Plaintiff alleges that Defendant manufactured an electrical power cord which was sold to Defendant Philips Consumer Electronics Company (“Philips”). Philips then used the electrical cord in manufacturing a security monitoring system, which they sold to and/or installed for Southern Creations. The system was allegedly defective and dangerous. Plaintiff asserts that the system was dangerous because of the faulty manufacturing of the equipment by Defendant and Philips. Plaintiff further alleges that the equipment manufactured, sold, and installed by Defendant and/or Philips did not provide adequate warnings of danger. The fire at Southern Creation damaged Learning House’s property.

Plaintiff brought an action against Philips and Southern Creations on July 9, 2003. Plaintiff filed an amended complaint adding Defendant on January 5, 2004. Defendant asserts that it believed that Plaintiff served Defendant, but later learned that Plaintiff has never served Defendant. On November 2, 2004, Defendant filed the instant motion to dismiss, asserting that Plaintiff’s service of process was improper, pursuant to Federal Rules of Civil Procedure 12(b)(5); process was insufficient, pursuant to Federal Rules of Civil Procedure 12(b)(4); and that the Court lacks personal

¹The factual allegations are taken from Plaintiffs’ complaint.

jurisdiction over Defendant, pursuant to Federal Rules of Civil Procedure 12(b)(2). However, Defendant filed an amendment to its motion to dismiss on January 25, 2005, withdrawing the issue of personal jurisdiction.

II. Analysis

Defendant first argues that Plaintiff's complaint should be dismissed pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure because Plaintiff did not meet the 120-day requirement under Rule 4(m) and because Plaintiff served a non-authorized agent under Rule 4(e). Rule 12(b)(5) enables a defendant to file a motion to dismiss for a plaintiff's failure to effect service of process. Rule 4 of the Federal Rules of Civil Procedure outlines the service requirements. Courts construe provisions of Rule 4 liberally in order to uphold service, requiring only "substantial compliance." Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir. 1982).

Rule 4(m) governs the length of time permitted for service of process. Rule 4(m) states in pertinent part:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Defendant argues that Plaintiff did not meet the Rule 4(m) requirement of service of process within 120 days, and, thus, the complaint should be dismissed. In fact, Defendant contends that Plaintiff never served Defendant.

When a plaintiff fails to perfect service within 120 days after filing a complaint, the plain meaning of the rule gives a district court the discretion to dismiss a complaint or to allow service to be perfected within a specified time, regardless of whether the plaintiff has demonstrated good cause. See Henderson v. United States, 517 U.S. 654, 662 (1996); Osborne v. First Union Nat. Bank

of Delaware, 217 F.R.D. 405, 406 (S.D. Ohio 2003). The Advisory Committee notes following Rule 4(m) state:

The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown.

Fed. R. Civ. P. 4, Advisory Committee Notes, Rule 4, subdivision (m). Furthermore, in Henderson, the United States Supreme Court noted that the 1993 amendments to the Rules afford courts discretion to expand the 120-day period, even if the plaintiff does not show good cause. 517 U.S. at 662. "The Federal Rules thus convey a clear message: Complaints are not to be dismissed if served within 120 days, or within such additional time as the court may allow." Id. at 663.

Plaintiff does not argue that it had good cause for the delay in service of process. Therefore, as Plaintiff correctly notes, the choices available to the Court are to dismiss without prejudice or to allow for the extra time it took for Plaintiff to effect service of process on Defendant. As the Plaintiff contends, it would be nonsensical to dismiss the action without prejudice so that Plaintiff could bring the action again with timely service. Defendant did not offer any evidence or information to explain its purported belief that service never occurred. Plaintiff maintains that Defendant was served. Without any evidence to the contrary, the Court will assume that Defendant has been served, especially in light of the fact that Defendant admits that it answered the complaint because it believed that it had been served. As actual service has been effected, the Court exercises its discretion and extends the time allowable for service, thus accepting that service was timely under the requirements of Rule 4(m).

Defendant further submits that it was improperly served by Plaintiff because a non-authorized individual, Kevin Fang ("Fang"), accepted service when Vincent Chen ("Chen") is the

registered agent for service of process. Thus, Defendant asserts, the complaint should be dismissed for improper service, pursuant to Federal Rule of Civil Procedure 4(e)(2).

Rule 4(e)(2) states in pertinent part that service may be effected “by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.” Fed. R. Civ. P. 4(e)(2).

Plaintiff maintains that it mailed service of process to Defendant with a restricted delivery requirement limiting delivery to Chen, the registered agent. Because Defendant admits that Chen is the registered agent and Plaintiff directed delivery to Chen, the Court finds that Defendant cannot prevent service by allowing Fang, who is not the registered agent, to accept service. Therefore, the Court holds that service of process was not improper. The Court, therefore, denies Defendant’s motion to dismiss based on improper service pursuant to Rule 12(b)(5).

Defendant next argues that process was insufficient under Rule 12(b)(4) of the Federal Rules of Civil Procedure. Rule 12(b)(4) permits a defendant to file a motion to dismiss for insufficiency of process. In this case, Defendant asserts that Plaintiff served the wrong defendant. It contends that the Longwell Company of Taiwan is the proper defendant, instead of Longwell Electronics, Inc. of Brea, California, whom Plaintiff served.

Plaintiff asserts that because the complaint names the Longwell Company a/k/a and d/b/a Longwell Electronics, Inc., the Defendant is properly named and served. Although Defendant alleges that the two companies are separate, it also admits that they are related. The Court holds that this is a question of fact that has not yet been resolved. Accordingly, the Court denies Defendant’s motion to dismiss based on insufficiency of process.

III. Conclusion

For the aforementioned reasons, the Court **DENIES** Defendant's motion to dismiss.

IT IS SO ORDERED this _____ day of February, 2005.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE